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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

MARY KESTERSON et al.,

Plaintiffs and Appellants,

v.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM et al.,

Defendants and Respondents.

B284977

(Los Angeles County
Super. Ct. No. BC502628)

APPEAL from a judgment of the Superior Court of
Los Angeles County. John Shepard Wiley, Judge. Affirmed.

Law Offices of John Michael Jensen and John Michael
Jensen for Plaintiffs and Appellants.

Reed Smith, Raymond A. Cardozo and Terence N. Hawley
for Defendants and Respondents.

Mary Kesterson, Hon. Marcel Poche (ret.), Michael Gilmore, the Estate of Robert Seymore, Gerald Dominguez, Jeffrey Walter, Brad Heinz, James Steed, and on behalf of a class of others similarly situated (appellants), appeal from a denial of their motion for class certification.

Appellants filed this action in March 2013, alleging that members of the class were owed interest and penalties based on a variety of different types of benefits that the California Public Employees' Retirement System (CalPERS) allegedly withheld or paid late. The purported class was defined as "All individuals who had or have funds, credits, monies, benefits, contributions, or assets . . . that are or were on deposit withheld by, entrusted to, or under the control of CalPERS, including during which time CalPERS failed to timely pay the funds (or refund the contributions) and failed to accrue, credit or pay interest on said funds." The various types of benefits included contributions; death benefits; ongoing survivor continuance benefits; "group life insurance" or similar benefits; service allowances or benefits; industrial disability allowances or benefits; "regular" or "ordinary" disability allowances or benefits; funds divided or accounted for pursuant to a legal separation, community property, or marriage dissolution; voluntary contributions, including to buy benefits; refunds; funds arising from contracts or settlement agreements or breaches thereof, including benefit elections; funds arising from benefit adjustments under collective bargaining, statute, contract, or otherwise; Replacement Benefits Plan funds, or those funds that exceed certain legal limits; funds held, reimbursed or paid late associated with expenses, fees, costs, "out of network," or other expenditures by participants for health or medical care; aggregated, accumulated lump sum payments of funds, whether service, disability, death, or other funds; other funds that a participant has on deposit with,

administered by, held by, or owed from CalPERS. For each type of benefit, appellants asserted that the common legal issue was that, pursuant to Civil Code section 3287, subdivision (a), interest was generally required when pensions, benefits or other payments are withheld or untimely paid. Further, appellants sought to certify a subclass of individuals who were allegedly entitled to payment of an additional “penalty interest” benefit under Government Code section 21499.

The trial court denied appellants’ motion for class certification on the grounds that (1) the size of the class is uncertain; and (2) the class was not amenable to class treatment. Specifically, the trial court found that appellants failed to develop an appropriate trial plan including a means to litigate CalPERS’s affirmative defenses and various individual variations in rights among the class members.

Our review of the trial court’s decision to deny class certification is narrow. Because substantial evidence in the record supports the trial court’s decision that individual issues would render a class action unmanageable, we affirm.

FACTUAL BACKGROUND

CalPERS is a large public pension fund and serves more than 1.8 million members in the CalPERS retirement system. CalPERS must verify the information it receives in order to safeguard against fraud and inadvertent overpayment. Thus, applicants for benefits must timely provide certain information prior to receipt of benefits. Contracting agencies are required to report compensation and other data to CalPERS. For example, a member seeking a basic service retirement must submit, among other things, an application listing a retirement date. The retirement date is the member’s last day on payroll. However, a member can keep a chosen retirement date as long as he or she submits an application within nine months of that date. A

retired member accrues benefits each day the member is retired, and the benefits are payable on a monthly basis. In the ordinary course, a member's first retirement payment will usually be either a partial month of allowance, or a partial month of allowance plus the member's first full monthly allowance. Thereafter, members receive monthly warrants that accrue with CalPERS's monthly warrant cycles.

Applicants and agencies vary substantially regarding their compliance, which sometimes results in errors and delays of benefits payments. Other issues may have an impact on the timing of payments. In addition, payments sometimes have to be adjusted due to events such as such as court rulings, deaths, or additional compensation information received from employers. When a payment is deemed retroactive, CalPERS generally will issue a lump-sum payment that aggregates amounts that accrued and matured on different dates. Disputes occasionally arise between CalPERS and individual members. CalPERS has established an administrative hearing process to address such disputes, which may be followed by writ petition or other proceedings against CalPERS.

Mary Kesterson

Earl Kesterson worked for the Beverly Hills Fire Department before he died in September 2011. His widow, Mary Kesterson, informed CalPERS of her husband's death on or about September 22, 2011. On or about October 14, 2011, Mary Kesterson completed and returned a CalPERS Application for Retired Member/Payee Survivor Benefits form. However, CalPERS failed to pay her the one-time death benefits until April 12, 2012. CalPERS originally paid Mary Kesterson an extra penalty payment, on April 16, 2012, then later wrote to her indicating it had miscalculated, and would be sending her an additional penalty payment. When CalPERS provided her with

the additional payment, Mary Kesterson refused to accept the payment on the ground that it was not sufficient.

Hon. Marcel Poche (ret.)

Marcel Poche was a justice on the First District Court of Appeal. He retired effective September 30, 2000. Two years later, then-Governor Gray Davis appointed Judge Poche to the position of Superior Court Judge on the Santa Clara Superior Court without adding years of service to his JRS pension. However, JRS and CalPERS deducted eight percent from his earnings as a judge for 10 years. Judge Poche resigned on August 13, 2012, and requested a refund of the \$133,573.26 in contributions since 2002. On October 30, 2014, JRS returned the \$133,573.26 without interest. Poche's representative has acknowledged that CalPERS would owe interest only from the time he demanded a refund after his second retirement, and that there is some discretion on the part of CalPERS as to how to handle that unusual situation.

Michael Gilmore

Michael Gilmore was a police officer in the Beverly Hills Police Department. In December 2005 he filed for Industrial Disability Retirement (IDR). In October 2009, he was notified that he had been approved for IDR effective December 27, 2008. Over the first two years of his retirement, CalPERS paid him varying amounts. In April 2012 CalPERS determined his proper pension amount, and sent a retroactive lump sum adjustment of \$36,000, with no interest. However, Gilmore admits that there was certain information that the City of Beverly Hills failed to report to CalPERS, delaying his benefit calculation, and it was his employer's responsibility to rectify the situation.

Estate of Robert Seymore

Robert Seymore, a former BART police officer, died of self-inflicted injuries. Seymore was named as an individual in the

original complaint, although he was already deceased. The FAC indicated generally that Seymore was represented by the personal representative for his three minor children. Appellants' counsel later named this personal representative as Christine Seymore Shell (Shell), who serves as guardian to the children. These procedural issues raised questions of timeliness and standing.

Seymore had filed for IDR in February or March 2011. His employer determined him to be industrially disabled on March 21, 2011. CalPERS allegedly underpaid him until October 2012, and did not pay interest. Again, CalPERS disputes whether Seymore's employer caused or contributed to the underpayment. Shell believes that Seymore is also owed money for service credit based on his prior service in the United States Armed Forces. These claims were disputed by CalPERS and were the subject of a separate pending class action against CalPERS. If such claims are successful, Seymore may have a separate claim for unpaid interest.

Gerald Dominguez

Gerald Dominguez was a BART police officer until August 2012. He filed for IDR in August 2012. Dominguez asserts that although his disability eligibility was established in August 2012, CalPERS failed to timely pay him the entirety of his benefits, and instead wrongly withheld funds. He received a one-time lump sum retroactive payment on April 1, 2013, covering the period from the date of his retirement on August 6, 2012 through April 1, 2013. The total payment was \$55,200, of which approximately \$35,200 was repaid to BART because BART was paying him advanced disability pension payments during the time that he was waiting for his CalPERS pension to begin. Thus, the amount of interest owed to Dominguez is in dispute.

Jeffrey Walter

Jeffery Walter was formerly a city attorney for the city of Cotati. He made several attempts to become a member of CalPERS. His efforts were contested, and he filed an administrative appeal over his eligibility for CalPERS membership. In July 2008, Walter deposited approximately \$469,000 with CalPERS. He claimed that CalPERS “induced” him to deposit the money, then later changed its mind. Walter was informed in June 2009 that he was not eligible for membership. Walter did not demand or request that CalPERS return the money because he believed that CalPERS’s determination that he was not eligible for membership was incorrect, and wanted to continue to appeal that decision. Walter eventually decided to settle and forgo the appeal for personal reasons. CalPERS returned the full amount that Walter deposited in December 2011, without paying interest.

Brad Heinz

Brad Heinz was an attorney working for the State of California for approximately 10 years. He filed for service retirement on May 21, 2012. He initially received a service retirement, but later amended his application and filed for disability retirement on May 30, 2012. A year later, on April 25, 2013, CalPERS determined that he was eligible for disability and approved his disability retirement effective May 31, 2012. However, CalPERS failed to pay the full disability allowance for six months. Instead, CalPERS paid only a portion of his pension allowance until November 1, 2013. In November 2013, CalPERS also paid a lump sum for the six months the pension was underpaid. CalPERS paid no interest on the delayed disability payments.

Heinz initiated separate administrative proceedings regarding non-payment, delayed payment or underpayment of

medical benefits. His claims in this class action relate to interest on the late payments at issue in those other proceedings.

James Steed

James Steed qualified for industrial disability retirement in 2010. He became involved in litigation with his family over the division of community property funds. Steed claims that CalPERS wrongfully withheld funds while the dispute was pending. Because CalPERS withheld the funds, Steed claims, CalPERS owes him interest for the period that it was holding the funds. Although Steed ultimately lost the case, and it was determined that he was not entitled to the funds, Steed claimed that CalPERS still owed him interest on approximately \$819 he received on remand. CalPERS took the position that the money it owed Steed was offset by money Steed owed to CalPERS. Steed claimed he no longer owed CalPERS any money because he declared bankruptcy. However, CalPERS disputed that claim.

PROCEDURAL HISTORY

The complaint

On March 8, 2013, appellants, individually and on behalf of a class of others similarly situated, filed this action for violation of statutory duties; interest; damages; breach of contract; equitable relief; injunctive relief; accounting; constitutional impairment of contract, and attorneys' fees.¹ The First Amended Complaint (FAC) was filed on September 16, 2013.²

¹ Initially, the class representatives were Mary Kesterson, Michael Gilmore, Robert Seymore, and Jeffrey Walter.

² The FAC named as class representatives Mary Kesterson, Marcel Poche, The Estate of Robert Seymore, Gerald Dominguez, Jeffrey Walter, Brad Heinz, Christopher Cervelli, and James Steed. The court sustained, without leave to amend, CalPERS's

The proposed class was defined as follows:

“All individuals who had or have funds, credits, monies, benefits, contributions, or assets (hereafter ‘funds’) that are or were on deposit with, held by, entrusted to, or under the control of CalPERS, including during which time CalPERS failed to timely pay the funds (or refund the contributions) and failed to accrue, credit or pay interest on said funds.

“The above defined class includes but is not limited to CalPERS enrollees who have or had funds on deposit with, held by, entrusted to, or under the control of CalPERS, including during which time CalPERS failed to timely pay the funds and failed to accrue, credit or pay interest on said funds, including for the period where payment of funds is wrongfully delayed, unpaid or held, (including those CalPERS enrollees who received lump sum or accumulated funds, benefits or payments from CalPERS) and upon the return, refund, or payment of said funds, CalPERS has refused and/or failed to pay, increase, accrue interest on those funds to the recipient.

“The above defined class includes but is not limited to beneficiaries of CalPERS enrollees who have or had funds on deposit with, held by, entrusted to, or under the control of CalPERS, including during which time CalPERS failed to timely pay the funds and failed to accrue, credit or pay interest on said funds, including for the period where payment of funds is wrongfully delayed, unpaid or held, (including those beneficiaries of CalPERS enrollees who received lump sum or accumulated funds, benefits or payments from CalPERS) and upon the

general demurrer to the claim for interest by Christopher Cervelli, who is not a party to this appeal.

return, refund, or payment of said funds, CalPERS has refused and/or failed to pay, increase, accrue interest on those funds to the recipient.

“The above defined class includes but is not limited to, individuals who are not enrolled in CalPERS who have or had funds on deposit with, held by, entrusted to, or under the control of CalPERS, including during which time CalPERS failed to timely pay the funds and failed to accrue, credit or pay interest on said funds, including for the period where payment of funds is wrongfully delayed, unpaid or held, (including those who received lump sum or accumulated funds, benefits, return of contributions, or other payments from CalPERS) and upon the return, refund, or payment of said funds, CalPERS has refused and/or failed to pay, increase, accrue interest on those funds to the recipient.

“The above defined class includes but is not limited to individuals who have earned a vested right to funds, benefits, allowances, credits, or payments from CalPERS, where interest is owed, but CalPERS failed to timely pay the funds and does not add or pay an increase or addition for interest.

“The above defined class includes but is not limited to participants to whom CalPERS failed to timely pay funds, or delayed payments in excess of 45 days, making CalPERS liable for ‘penalties,’ including pursuant to Government Code section 21499.”

Public records act request

Pursuant to the Public Records Act, in 2013, appellants requested that CalPERS provide data on payments made by CalPERS since 2000, including information on service retirements, returns of contributions, deaths, and “other

benefits.” CalPERS does not normally keep data in the form requested, so it spent hundreds of staff hours complying with these requests. Ultimately, it produced voluminous spreadsheets. The included information varied between the types of benefits.

The data fields in the electronic business records included: (1) the retirement date; (2) the payee name; (3) the amount of payment; (4) the payment date; (5) the benefit type; (6) the payee type; (7) the payment type; and (8) other details.

For death benefits, data fields included: (1) the payee name; (2) the deceased name; (3) death date; (4) date that death was reported; (5) “Last Doc Received” date; (6) the date payment was released; (7) the warrant issue date; (8) payment type; (9) amount of payment; (10) the penalty interest under Government Code section 21499; and (11) other details.

Payments are listed as “ongoing,” “one-time,” “retroactive,” “additional,” or “lump-sum.”

CalPERS explained that it provided as much responsive information as it could to appellants’ Public Records Act request. However, the request sought millions of documents that would have included a substantial amount of confidential information about CalPERS’s members. Counsel met and conferred regarding the essential information, and ultimately prepared two charts: one regarding death payments and one regarding non-death payments. The Public Records Act request did not seek information regarding when payments accrued or “matured.”³

³ The accrual date is the date that CalPERS received all of the information necessary to calculate each retirement benefit. The “retirement date” in the charts is simply the effective retirement date within the meaning of Government Code section 21252. That date does not necessarily coincide with the date that the member submitted a retirement application or when

Further, CalPERS would not have been able to provide such information without reviewing individual files, which would have been unduly burdensome. Appellants' counsels subsequently requested additional information regarding accrual of benefits. CalPERS counsel explained that it was unable to provide such additional information without tremendous burden and expense. CalPERS did not believe it was required to engage in such a task under the Public Records Act. Certain of the named class representatives do not appear in the charts for various reasons, including the date of those individuals' payments.

Class certification and related briefing

Appellants filed their motion for class certification on June 15, 2015, including a memorandum of points and authorities and supporting declarations. Appellants asserted that the common legal issue was that “interest is generally required when pensions, benefits, or other payments are withheld or untimely paid.” Appellants asserted that each individual acquired vested and fully matured rights to payment in determinable amounts, but CalPERS failed to pay such amounts when due and failed to pay interest on withheld or delayed funds. Appellants asserted that the proposed class consisted of “in excess of 100,000 individuals.” Appellants also sought to certify a subclass of individuals who were allegedly entitled to payment of an additional penalty interest benefit under Government Code section 21499. Appellants argued that liability could be adjudicated on a class-wide basis, and once it proceeded to the remedial stage, the amount owed to each individual could be addressed “in a number of ways.” Appellant referenced the existing spreadsheets that CalPERS produced in the Public

CalPERS received all information necessary to calculate the retirement benefit.

Records Act responses, which, appellants claimed, identified “many” class members, payments and dates of payments. Appellants defined the class with substantially the same six-paragraph definition it originally used to define the class in its FAC, and added the last category of individuals owed penalties as a subclass.

Acknowledging that there may exist certain individual questions as to the amount of interest owed, appellants stated that “the Court can easily fashion a common, mathematically precise methodology to calculate interest owed administratively using data largely supplied from CalPERS’ records, database, and information.” Appellants speculated that CalPERS “should have all the necessary information,” and that if it did not “information can be estimated with an inference from the known data to shift the burden to CalPERS to disprove the amounts claimed.”

On January 11, 2017, CalPERS filed its opposition to appellants’ motion for class certification. CalPERS argued that each named plaintiff had idiosyncratic claims against CalPERS, and that such diverse claims could not be the proper subject of a class action. CalPERS argued that appellants did not meet the requirements for class certification because the class was not ascertainable, individual issues would prevail, and CalPERS would be deprived of its right to defend itself against member-specific issues arising as to each case, among other things.

CalPERS concurrently filed a motion to exclude the statement of appellant’s expert Donald Ylvisaker and appellants’ trial methodology plan, as well as objections to other evidence. In support of its opposition CalPERS filed the declaration of Anthony Suine, Chief of the Benefit Services Division for CalPERS.

In its motion to exclude the statement of Ylvisaker, CalPERS argued that appellants' trial methodology plan ignored the highly individualized nature of each member's claim and relied on an unsworn statement by Ylvisaker, a retired statistics professor. Specifically, Ylvisaker admitted that he had not reviewed appellants' sweeping class definition, their individual claims and circumstances, nor did he know anything about the benefits administration process or CalPERS's potential defenses in this litigation. Ylvisaker admitted in his deposition that his calculations did not account for variability in the putative class and he simply assumed no variability existed. He further admitted that he could not tell, based on the CalPERS spreadsheets, when obligations matured. If, for example, a retirement date listed on the spreadsheet was not the maturity date of CalPERS's obligation, his calculation would be incorrect.

In his declaration, Suine testified that appellants' suggestion that all relevant determinations could be made formulaically based on electronic data was erroneous. Suine further disagreed that the divergent claims at issue in the lawsuit could be resolved in a single proceeding. Suine pointed out that (1) the proposed class was massive, consisting of at least two million individuals; (2) for some members, CalPERS disputes that any benefits were owed to begin with; (3) numerous member-specific issues needed to be decided regarding when any payments were allegedly due, withheld, or delayed; and (4) CalPERS has not kept, and was not obligated to keep, the type of electronic data that would facilitate such individualized inquiries. Rather, any resolution would require "the review of separate member files, records of judicial or administrative proceedings, and/or other sources." While Suine acknowledged that delays do arise in specific cases, "numerous factors beyond CalPERS' control influence the processing time for any particular payment,

including actions by members, beneficiaries, employers and other third parties in possession of information that CalPERS needs to accurately calculate benefits.” Suine also explained that CalPERS’s data storage systems have changed over time, and not all records have been stored on a single system. Suine explained that the spreadsheets provided to appellants did not reflect, and did not intend to reflect the accrual date for the various payments. CalPERS did not historically track such information. Suine discussed specific examples demonstrating the types of critical information that can only be obtained by reviewing individual member files, and the ways in which appellants’ trial methodology plan ignored such complexities.

On March 29, 2017, appellants filed their reply to CalPERS’s opposition to the motion for class certification. Appellants also submitted new evidence, including the declaration of former CalPERS employee Marlene Cody. Cody was a Retirement Program Specialist at CalPERS prior to her retirement. In her declaration, Cody claimed that, “[a]lthough it may take some effort, I think that all the information needed to calculate liability for interest and the amount of interest and other information could be ascertained readily by electronic searches of CalPERS’ IT systems with sufficient accuracy to make interest and benefit payments without review of individual files.” Cody did not explain how CalPERS could obtain such information without review of individual files.

Appellants also filed the declaration of Michael Evans, a consultant who worked with CalPERS to implement its current information system. Evans was asked whether and how to retrieve specific data from the various CalPERS IT systems such that the results would supply reliable information and accurate information in electronic form without requiring individual file review. Evans testified that such information can be

electronically gathered from the various systems used by CalPERS.

Finally, appellants filed the declaration of Patricia Pierce, who worked for CalPERS in administration of death benefits. She explained the information storage and processing system that CalPERS used during the time that she worked in death benefits. She opined that CalPERS sometimes paid death benefits late.

Appellants also moved to strike the declaration of Anthony Suine. They sought an evidentiary hearing regarding the class certification issues in dispute.

On April 17, 2017, CalPERS filed a motion to exclude the new evidence that appellants filed in support of their reply brief.

The court's ruling

On August 1, 2017, the trial court held a hearing on the motion for class certification and related motions. The same day, the court issued its "Amended and final ruling" denying appellants' motion for class certification and for an evidentiary hearing. Further, the court granted CalPERS's motions to strike the statement of Ylvisaker and the new evidence submitted in support of appellants' reply brief. The court also granted, in small part, appellants' motion to strike the Suine declaration.

As to class certification, the court ruled that the size of the class was uncertain. While appellants claimed it was "in excess of 100,000," CalPERS claimed it was approximately two million. The court also found that appellants' trial plan was inadequate. In particular, appellants stated that "Once liability is established, the Court can easily fashion a common, mathematically precise methodology to calculate interest owed administratively using data largely supplied from CalPERS'[s] records, database, and information." The court indicated it was not the court's burden to develop a method for the trial of

appellants' claims. Instead, it was appellants' burden, which they failed to discharge. The court rejected the mathematical formula provided by appellants' attorney, which failed to explain the figures used or operations performed. Finally, the court noted that appellants did not explain how they intended to litigate CalPERS's affirmative defenses. The court cited *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 40 (*Duran*) for the proposition that "[A]ny class action trial plan, including those involving statistical methods of proof, must allow the defendant to litigate its affirmative defenses." The court used the recent case of *Flethez v. San Bernardino County Employees Retirement Assn.* (2017) 2 Cal.5th 630 (*Flethez*) to illustrate the complexity in determining the date on which a pension plan begins to owe a retired employee interest.

As to Ylvisaker's statement, the court found that he was a statistician with no "special knowledge, skill, experience, training, or education" that qualified him to give an expert opinion on the timing of CalPERS's payments. Ylvisaker's opinion on CalPERS's responsibility for delay was an improper legal conclusion. Further, Ylvisaker's opinion that all the needed data are known, therefore statistical inference is unnecessary, was a tautology. Ylvisaker had no basis for his conclusion that all relevant information in this action is known, apart from what appellants' lawyer told him. The court noted it is improper to use an expert to merely parrot counsel's legal conclusion. The court therefore struck Ylvisaker's statement.

As to the new evidence offered in support of appellant's reply brief, the court noted that it may exclude evidence advanced for the first time in reply. (Citing *In re Marriage of Hoffmeister* (1984) 161 Cal.App.3d 1163, 1171 (*Hoffmeister*).) Appellants did not explain why they could not have presented this evidence earlier. Further, the evidence did not cure the

problems with appellants' motion and proposed trial management plan. As to Evans, he did not address CalPERS's evidence that it could not readily identify all instances in which a member caused a delay in payment. Evans's declaration therefore would not change the court's analysis, even if it were admissible. As to Cody, her statement that all information needed to calculate liability for interest could be readily obtained by searches of CalPERS's IT systems was a legal argument, to which Cody could not testify under penalty of perjury. Further, Cody's declaration contained speculation. She speculated as to the number of people who actually caused the delays in their payments, and she speculated that CalPERS "likely stored" information about the reasons for additional payments. As to Pierce, her declaration was irrelevant to the determination of whether appellants' proposed trial methodology was adequate.

Notice of appeal

On September 11, 2017, appellants timely filed their notice of appeal.

DISCUSSION

I. Legal standards

Code of Civil Procedure section 382 permits a matter to proceed as a class action when "the question . . . is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court" [Citations.] Thus, a party seeking class certification must "demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceedings as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*)). The "community of interest" requirement includes three factors: (1) predominant common questions of law or fact;

(2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. (*Ibid.*) In assessing whether predominant common issues exist, the “ultimate question” is “whether ‘the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.’ [Citations.]” (*Duran, supra*, 59 Cal.4th at p. 28.)

However, class treatment is not appropriate “if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following the “class judgment” on common issues. [Citation.]” (*Duran, supra*, 59 Cal.4th at p. 28.) In addition, the parties seeking class certification must show that “litigation of individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently. [Citation.]” (*Id.* at p. 29.) “[W]hether in a given case affirmative defenses should lead a court to approve or reject certification will hinge on the manageability of individual issues. [Citation.] [Citation.]” (*Ibid.*)

We give the trial court great deference when reviewing a class certification order on appeal. (*Brinker, supra*, 53 Cal.4th at p. 1022.) The decision to certify a class rests squarely within the discretion of the trial court, and we reverse only for a manifest abuse of that discretion. (*Ibid.*) Generally, we will only reverse a certification order if “(1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. [Citations.] [Citations.]” (*Ibid.*) A finding that the court stated at least one valid reason for denying

class certification is sufficient to uphold the order. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436.)⁴

II. The trial court did not abuse its discretion in denying class certification

The trial court gave several reasons for its decision to deny class certification. The court found that the class was uncertain; appellants provided an inadequate trial plan; and appellants failed to explain a manageable way to allow CalPERS to litigate its affirmative defenses.

A. Uncertainty of class

In determining whether a class is ascertainable, the trial court examines the class definition, the size of the class, and the means of identifying class members. (*Bomersheim v. Los Angeles Gay & Lesbian Center* (2010) 184 Cal.App.4th 1471, 1480.) The purpose of the ascertainability requirement is to ““give notice to putative class members as to whom the judgment in the action will be res judicata.” [Citation.] . . .’ [Citation.]” (*Ibid.*) “Class members are “ascertainable” where they may be readily identified without unreasonable expense or time by reference to official records. [Citation.]” (*Ibid.*) Here, the class definition was six paragraphs long and specifically encompassed various subcategories including CalPERS enrollees, beneficiaries of CalPERS enrollees, individuals who were not enrolled but entitled to money, and individuals who have earned a vested interest in funds. Appellants argue that the “common

⁴ We reject appellants’ assertion that the proper standard of review is de novo. Appellants cite *Olson v. Cory* (1983) 35 Cal.3d 390, 402, in which the Supreme Court interpreted Civil Code section 3287, for the proposition that interpretation of a statute is a question of law. Here, we are not interpreting section 3287, but determining whether the trial court acted within its discretion in denying class certification.

maturity and payment characteristics” are stored in CalPERS’s database and can be retrieved electronically. Although appellants acknowledge that “each Plaintiff bears responsibility to act before the rights mature into obligations to pay,” appellants do not describe how they can ascertain the differences between class members who have complied with that obligation and those who have not. Thus, there is no objective means for determining whether an individual, even if included in the data produced, is a member of the proposed class.⁵ Further, as the trial court pointed out, the two parties had vastly differing estimates as to the number of individuals this class would include. Appellants acknowledge the dispute between the parties regarding how many members CalPERS paid late, yet provide no rational basis for determining the size of the class.⁶ We discern no abuse of discretion in the trial court’s finding that the proposed class is not ascertainable.

B. Inadequacy of trial management plan and litigation of affirmative defenses

As part of the class certification process, the plaintiffs must show that issues of law and fact common to the class predominate. (*Duran, supra*, 59 Cal.4th at p. 28.) If a defendant’s liability ““can be determined by facts common to all members of the class, a class may be certified even if the members must individually prove their damages.” [Citations.]’

⁵ According to CalPERS, the spreadsheets produced by CalPERS include only a fraction of the putative class, due in part to the various storage systems used by CalPERS over the years.

⁶ Appellants answer this problem with the statement: “Simply because CalPERS said that it owed interest on many more, that does not mean the class members are not ascertainable.”

[Citations.]” (*Ibid.*) Class treatment is not appropriate “if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following the “class judgment” on common issues. [Citation.]” (*Ibid.*)

In determining whether appellants have proposed an adequate trial management plan, the trial court must be confident that the plan “permit[s] the litigation of relevant affirmative defenses, even when these defenses turn on individual questions.” (*Duran, supra*, 59 Cal.4th at p. 25.) “[W]hether in a given case affirmative defenses should lead a court to approve or reject certification will hinge on the manageability of any individual issues. [Citation.]’ [Citation.]” (*Id.* at p. 29.) In determining whether a class action is the best way to handle a controversy, “the manageability of individual issues is just as important as the existence of common questions uniting the proposed class.” (*Ibid.*) “Defenses that raise individual questions about the calculation of *damages* generally do not defeat certification. [Citation.]” (*Id.* at p. 30.) However, “a defense in which *liability itself* is predicated on factual questions specific to individual claimants poses a much greater challenge to manageability.” (*Ibid.*)

Here, CalPERS raised individual defenses that challenged its liability to pay interest as to individual members. As the trial court noted, members or their employers had obligations to act before CalPERS’s payment obligation matured. This raised the possibility that a delay or underpayment in a given case may be attributable to class members or persons other than CalPERS. CalPERS’s potential defense that a given delay was not attributable to CalPERS, but to someone else, is a “defense in which *liability itself*” would be predicated on factual questions specific to individual claimants. (*Duran, supra*, 59 Cal.4th at p.

30.) Such individual questions pose “a much greater challenge to manageability,” thus weigh against class certification. (*Ibid.*)

Evidence in the record supported the trial court’s determination that individual issues would provide a challenge to manageability. Portions of Suine’s declaration explained that the effective retirement date listed in CalPERS’s records did not represent the date when CalPERS had sufficient information to cause its payment obligation. Further, there was evidence that BART, the former employer of Seymore and Dominguez, had trouble reporting compensation correctly, which led to CalPERS disallowing certain compensation. The trial court reasonably determined that appellants’ trial plan did not sufficiently address the problem of determining the cause of a delayed or disallowed payment.

Further, the record shows other individual issues pertinent to certain individual claims. For example, as to plaintiff Steed, it was determined in a separate proceeding that much of the community proceeds to which he claimed, actually belonged to another. As to the remainder of the claim, CalPERS contends that any remaining funds are offset by prior overpayments by CalPERS. This individual issue is solely applicable to Steed. Similarly, Heinz’s claims for medical reimbursement and Seymore’s claims for service credits are currently the subject of separate proceedings. CalPERS does not acknowledge the underlying liability on these claims, thus CalPERS’s liability for interest in each case would require individual analysis.

The claims of Poche and Walter further illustrate the necessity of individual inquiries into each matter. While Poche claims that CalPERS “wrongfully withheld” eight percent of his judicial salary beginning in 2002, CalPERS disagrees. Therefore,

underlying liability is at issue.⁷ As to Walter, he requested that CalPERS allow him to deposit money, and did not ask for it back while he contested the finding that he was ineligible for membership. Again, CalPERS disputes whether it was at fault for not returning the money earlier, and this individual issue would need to be litigated prior to any determination of interest. Appellants have not articulated any mechanism for litigating these liability issues as part of a class action.

As legal support for its decision to deny class certification in part due to the lack of an adequate plan to litigate CalPERS's affirmative defenses, the trial court discussed *Flethez*. The trial court stated, "Determining when a benefit plan (like CalPERS) must pay prejudgment interest to a benefit claimant can be intricate." The court then listed 10 relevant dates from the *Flethez* case, including the employee's last day of work, the day he filed an incomplete application for disability retirement, the date he filed a complete application, the date he was granted retroactive pay, and the date he requested further retroactive pay. As to the question of when the employee's retirement association began to owe him interest, the answer was, "we don't know." The trial court noted that "four years of litigation produced, not a date certain, but rather a remand to the superior court for a factual determination" regarding the date that the employee was wrongfully denied pay. The trial court noted that appellants' trial plan ignored such factual complexities. The *Flethez* case provides a persuasive basis for the trial court's reasoning on this issue. The trial court did not abuse its

⁷ CalPERS also intends to assert a statute of limitations defense against Poche, who contends that certain of his claims are subject to the delayed discovery rule. Again, adjudication of such an issue is case-specific.

discretion in determining that appellants' proposed trial methodology plan was inadequate.

III. Appellants' questions presented are largely irrelevant in reviewing the denial of class certification

Appellants present 18 issues on appeal, most of which are not pertinent to our review of the trial court's denial of class certification. Appellants ask: "(1) What are CalPERS responsibilities under the California constitution, the statutes, and its fiduciary duties to collect data, to pay benefits on time, to maintain evidence to determine who is responsible for any delays, and to pay interest if benefits are not paid on time?" Appellants' remaining 17 issues on appeal ask us to determine when various benefits mature, including pension, retirement, disability, and death benefits; whether CalPERS's databases contain sufficient information to make a class action manageable; and whether CalPERS carries the burden of preserving evidence supporting its affirmative defenses.

These questions in appellants' opening brief are not relevant to a class certification analysis on appeal. (See *Brinker, supra*, 53 Cal.4th at pp. 1021-1022.) CalPERS's responsibilities, the maturation dates of the various payments, the date interest began to accrue in the case of late or withheld payments, and the obligations of CalPERS are questions of fact that need to be addressed at the appropriate time by the trial court in the first instance. Ascertainability of the class, and management of the class action, were the determinative factors in the trial court's decision. We decline to discuss the questions presented by appellants which serve only to lead this court down irrelevant paths.⁸

⁸ In their reply brief, appellants rely extensively on *Wilmot v. Contra Costa County Employees' Retirement Assn.* (2018) 29

Further, we decline to address in detail appellants' arguments that the trial court was simply incorrect in determining that appellants had failed to come up with an adequate trial management plan. Appellants repeatedly argue that, contrary to the trial court's findings, the maturation dates for the various categories of benefits are readily available and interest will be simple to calculate.⁹ In making these arguments regarding the ease of determining liability, appellants ignore the standard of review: abuse of discretion. (*Brinker, supra*, 53 Cal.4th at p. 1022.) As set forth above, there exists in the record ample evidence that CalPERS would contest its underlying liability on numerous individual claims. The trial court, reviewing the evidence in the first instance, was entitled to credit

Cal.App.5th 846, review granted February 13, 2019, S252988. As review has been granted in this case, we decline to rely on the case. (Cal Rules of Court, rule 8.1115(e)(1) [When review of a published opinion has been granted, "a published opinion of a Court of Appeal in the matter has no binding or precedential effect"].) Further, the *Wilmot* case discussed the proper interpretation of the California Public Employees' Pension Reform Act of 2013 pension forfeiture provision, which is not applicable in this case, and thus holds no persuasive value. To the extent that the lower court's order fails to mention the proper interpretation of the Public Employees Retirement Law, that is because, as we have also determined, it is irrelevant to the questions surrounding class certification before us in this matter.

⁹ In particular, appellants proposed to use the statutory maturation date, determine when payment was made in full through the warrant history, and then add 45 days to the maturation date to quantify the date that the payment fell due. However, the court credited evidence showing that "the possibility exists that some members may have caused a delay of more than 45 days," and found that appellants' trial plan was inadequate to deal with this possibility.

the evidence suggesting that a class action was not the appropriate vehicle for appellants' claims. Although appellants may have a different perspective on this question, we are obligated to give the trial court great deference when reviewing a class certification order on appeal, and reverse only for a manifest abuse of that discretion. (*Ibid.*)

IV. CalPERS's failure to retain data does not undermine the trial court's decision denying class certification

Appellants suggest that, because CalPERS failed to retain its data in a way that serves to facilitate this class action, CalPERS should pay the price for such failure. We note there is no requirement in the law that an entity maintain data in an aggregate form in order to support a class action. (*Hale v. Sharp Healthcare* (2014) 232 Cal.App.4th 50, 61; see also *Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 919-922.) Where such data does not exist, and the administrative costs of collecting such data outweigh the benefit to the class, a class action should not be certified. (*Hale*, at p. 61.)

Appellants first focus on the data that CalPERS has provided, claiming that CalPERS "created the thresholds, data, fields, and criteria as part of its internal practice." Thus, appellants argue, "the data and fields also prove that CalPERS paid late and is responsible for interest, across the class." However, as appellants implicitly admit, evidence in the record disputes this assertion. Specifically, the Suine declaration explains in detail that CalPERS did not historically keep such records, and that in fact, the spreadsheets provided to appellants did not contain certain critical information, such as the accrual date for various payments.¹⁰

¹⁰ This portion of Suine's declaration was ruled admissible evidence in the trial court.

Appellants argue that CalPERS's "poor record-keeping" should not allow it to avoid class certification because CalPERS's "responsibilities include the duty to record information about any affirmative defenses where a member caused or contributed to any delay." In other words, appellants suggest a burden-shifting, where "CalPERS should be the responsible party to pay interest when benefits are delayed except if CalPERS can affirmatively prove that the individual caused the delay." Appellants essentially argue that CalPERS's failure to retain records easily amenable to class claims "should not shift this burden onto [a]ppellants."

It was appellants' burden to "demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceedings as a class superior to the alternatives. [Citations.]" (*Brinker, supra*, 53 Cal.4th at p. 1021.) As part of the class certification process, appellants were required to show that issues of law and fact common to the class predominate. (*Duran, supra*, 59 Cal.4th at p. 28.) Class treatment is not appropriate if there are numerous and substantial individual questions. (*Ibid.*)

It was also appellants' burden to come up with a reasonable trial plan which "permit[s] the litigation of relevant affirmative defenses, even when these defenses turn on individual questions." (*Duran, supra*, 59 Cal.4th at p. 25.) Appellants cite no legal authority for their position that, at any time during the class certification process, the burden of proving manageability shifted to CalPERS due to its alleged failure to accurately record each circumstance in which a third party was responsible for a delayed payment. We decline to create such a requirement in

light of the legal authorities, which consistently place the burden of demonstrating class manageability on the plaintiffs.¹¹

There is no support for appellants' argument that CalPERS has "forfeited" its affirmative defenses by failing to keep records in the form that appellants require. Appellants argue that section 17 of Article XVI of the California Constitution implicitly requires CalPERS to refrain from the "poor administration" that has led to its inability to easily access information regarding its affirmative defenses. Article XVI, section 17 states, in relevant part:

"[T]he retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system, subject to all of the following: [¶] (a) The retirement board of a public pension or retirement system shall have the sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system. The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries. The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system. [¶] (b) The members of

¹¹ Appellants argue that CalPERS had a duty to keep sufficient records documenting activity in a member's account. (Citing Gov. Code, § 20170.) The issue of whether such a duty exists, and whether any such duty would cause a burden shift on the merits of any claim of interest, is not relevant to a determination of class certification.

the retirement board of a public pension or retirement system shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty."

Appellants argue that CalPERS's "excuses and discretion" are constrained by these constitutional requirements. However, the constitutional directives set forth above do not require CalPERS to collect and retain data in any particular format. In particular, they do not require CalPERS to maintain its records in a way that facilitates class action lawsuits such as the present one. We decline to mandate that CalPERS maintain its records in such a way in order to avoid forfeiture of its affirmative defenses. Appellants point to no specific evidence that CalPERS has failed to fulfill its obligation to maintain records in a reasonable way for the benefit of participants and their beneficiaries. Instead, appellants imply that CalPERS is required to maintain its records in a way that anticipated this lawsuit. We decline to impose such a difficult standard on the obligations set forth in article XVI, section 17 of the California Constitution.¹²

¹² Appellants cite two cases in support of their argument that prudent record-keeping is necessary and should cause forfeiture of CalPERS's affirmative defenses in this case. Neither case supports such a position. *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 471-472 involved a discussion of whether the trial court correctly determined that county employment retirement plans had discretion to collect arrears contributions,

Pursuant to *Duran*, “the class action procedural device may not be used to abridge a party’s substantive rights. ‘Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends -- to sacrifice the goal for the going.’ [Citation.]” (*Duran, supra*, 59 Cal.4th at p. 34.)¹³

rather than a mandatory obligation to collect arrears contributions. (*Id.* at p. 469.) In affirming the trial court’s decision, the First Appellate District, declined to “order retirement boards to act in a specific manner, and to usurp the boards’ authority.” (*Id.* at p. 471.) The court noted that article XVI, section 17 limits this discretion, such that the retirement boards’ discretion is “not unfettered.” (*Ibid.*) However, the appellants had not shown an abuse of such discretion, despite the constitutional restraints. (*Ibid.*) Similarly, in *City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, the city disputed the retirement system’s categorization of certain pay as “compensation attached to rank.” (*Id.* at p. 239.) In rejecting the city’s public policy argument in support of city taxpayers, the First Appellate District highlighted the retirement plan’s duty to “its participants and their beneficiaries,” which “shall take precedence over any other duty.” (*Id.* at p. 242.) Thus, the city’s budgetary concerns “must give way to the legitimate pension concerns of the impacted PERS retirees.” (*Id.* at p. 243.) Neither case mandates that we take a position that CalPERS must keep its records in a manner that facilitates class action lawsuits such as the present one.

¹³ Nor does *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721 (*Mendoza*) support appellants’ position that the consequences for CalPERS’s failure to “keep sufficient records” should “fall on CalPERS.” *Mendoza* was an action brought by an individual against his former employer for unpaid overtime. The Court of Appeal reversed the trial court’s determination that it could not ascertain from the evidence how much overtime the former employee worked, sending the matter back for a calculation and

V. Death and disability benefits subclasses

Appellants argue that for the two subcategories of death and disability benefits, there are no manageability issues. Appellants ignore specific evidence in the record that individual issues existed as to both categories of benefits.

As to disability retirement benefits, there was evidence that the retirement date in the spreadsheets was different from the date that CalPERS had the information needed to put an individual into disability retirement status. This was illustrated through the facts relating to named plaintiff Heinz, who initially obtained a service retirement, but subsequently applied for disability retirement. CalPERS's liability for late payments or underpayments is contested in separate proceedings involving records from his individual file.

As to death benefits, CalPERS has submitted evidence that its data often records lump sum payments without segregating individual components, such as interest. Thus, individual review of each file is necessary to determine if interest is owed. The Suine declaration details the individual analysis required for each beneficiary. The trial court did not abuse its discretion in determining that individual liability issues prevailed in these two sub-categories, thus rendering class action inappropriate.

VI. Exclusion of evidence

Finally, appellants argue that the trial court erred in striking the declarations of Cody, Evans, Pierce, and Ylvisaker. "On appeal, a trial court's decision to admit or not admit evidence, . . . is reviewed only for abuse of discretion. [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 153, 197.)

award of damages to the former employee. (*Id.* at p. 728.) The case does not discuss the proper standards or burdens in a motion for class certification.

Appellants argue that their “percipient expert” declarations “clarified that CalPERS collected and maintained the information sufficient to determine CalPERS liability and to calculate interest precisely for each individual across the class.” The trial court cited *Hoffmeister, supra*, 161 Cal.App.3d 1163, 1171 for the proposition that it may exclude evidence advanced for the first time in reply. Appellants present no legal authority to the contrary. Thus, the trial court’s decision not to permit the evidence as a procedural matter was not an abuse of discretion.

The trial court further presented detailed rationale regarding its consideration of each individual declaration, and the reasons each would not change its decision. We consider these separately, as the trial court did.

As to the declaration of Cody, the trial court determined that her testimony was speculative, incomplete or irrelevant, and contained an improper legal opinion. Appellants attack only the trial court’s determination that Cody offered a legal opinion. Cody stated her opinion that “all the information needed to calculate liability for interest and the amount of interest and other information could be ascertained readily by electronic searches of CalPERS’[s] IT systems with sufficient accuracy to make interest and benefit payments without review of individual files.” The trial court struck this as an improper legal opinion. Appellants provide a single sentence in response, disagreeing with the trial court, and claiming that Cody’s opinion was “based on her percipient experience, including searching and finding the information that allowed CalPERS to add interest.” Appellants do not explain how Cody had the expertise to opine that such a search would reveal “all the information needed to calculate liability” in this case. Nor do appellants provide any legal authority on this issue. Under the circumstances, appellants have failed to show an abuse of discretion.

As to the declaration of Evans, the trial court found his declaration to be largely irrelevant, as he devoted “the bulk of his declaration to his complaints about myCalPERS.” While Evans provided some information regarding information that can be electronically gathered from the systems, the trial court noted that Evans did not address CalPERS’s evidence showing that it cannot readily identify all instances in which a member caused a delay in payments. Thus, the declaration was largely irrelevant to the issues before the court. Appellants argue that Evans provided information regarding “how the information is held in CalPERS IT systems,” as well as “the flaws in the computer system.” Again, appellants fail to provide citations to any legal authority suggesting that the trial court erred, nor do they explain how Evans’s declaration was relevant to the issue of class certification. Under the circumstances, appellants have failed to show an abuse of discretion.

The declaration of Pierce discussed the payments that relate to the death of a member, including “pre and post-retirement benefits, statutory benefits, lump sums, survivor continuances, ongoing allowances, and other benefits.” Pierce testified to the data that CalPERS recorded. She further testified that CalPERS sometimes paid death benefits late, and failed to allocate enough “money, and staff and attention” to processing death benefits. She opined that CalPERS did not consistently pay interest on late benefits. The trial court determined that Pierce’s declaration was “irrelevant to the determination of whether [appellants’] proposed trial methodology plan is adequate.” Again, appellants fail to provide reasoned argument and authority as to why the trial court’s decision was incorrect, and have failed to show an abuse of discretion.

Statistician Ylvisaker opined that there was sufficient data to calculate interest and to entitlement such that there was no

need for statistics. The trial court’s main reason for striking the declaration was that it presented an improper legal conclusion. Specifically, Ylvisaker opined that “every payment that CalPERS made more than 45 days after the date on which [appellants] contend[] it matured was necessarily improperly withheld,” and therefore appellants are entitled to recover interest on such payments. The court held, “Ylvisaker’s opinion on CalPERS’s responsibility for a delay is a legal conclusion, and is therefore improper.” Further, the court took issue with Ylvisaker’s statement that “no statistics are needed because [appellants’] lawyer told him all the needed data are known and statistical inference is therefore unnecessary.” The trial court concluded, “This is not a statistical opinion. Rather it is a tautology: estimation is unnecessary when all information is known.” The court noted that “[t]autologies . . . are unhelpful here.” Further, Ylvisaker had no basis for his conclusion other than what appellants’ attorney told him. The court stated: “It is improper to use an expert merely to parrot counsel’s legal contention.”

On appeal, without citation to legal authority or reasoned argument, appellants repeat their position that Ylvisaker’s opinion showed “there was sufficient data to calculate the interest and entitlement such that there was no need for statistics.” This is inadequate to show an abuse of discretion.¹⁴

¹⁴ We decline to address appellants’ argument that the formulation and passage of California Code of Regulations, title 2, section 555.5 (section 555.5) was wrongful. Appellants point out that in direct response to this lawsuit, CalPERS formulated section 555.5, which gives CalPERS “reasonable processing time” after maturation without paying interest. Appellants fail to articulate any clear argument as to how this act was illegal or improper, or cite any legal authority as support for their position. It is appellant’s obligation to articulate claims of reversible error

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT

and “present argument and authority on each point made.”
(*County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 591.)
An appellant’s failure to meet this burden may be considered an
abandonment of the appeal. (*Berger v. Godden* (1985) 163
Cal.App.3d 1113, 1119.) Under these circumstances, appellants
have forfeited this argument, and we decline appellants’
invitation to “ignore” section 555.5.